Rule 3, The Enabling Act, and Statutes of Limitations

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I. INTRODUCTION

Rule 3 of the Federal Rules of Civil Procedure appears to be a model of simplicity and clarity. It reads, "A civil action is commenced by filing a complaint with the court." In defining "commencement" it also appears to provide guidance on how to begin an action which complies with a statute of limitations.[1] Because of the decision in *Walker v. Armco Steel Corp.*,[2] that appearance is misleading in regard to state statutes of limitations applicable in federal court actions brought on the basis of diversity of citizenship jurisdiction. In *Walker* the Supreme Court stated there is "no indication that . . . Rule [3] was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations."[3] The Court then proceeded to hold that the state commencement provision, requiring service of process, was to be applied to determine whether the action had been brought in time to comply with the state statute of limitations.[4] The above-quoted statement from *Walker* makes refer-

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1. In Moore Co. v. Sid Richardson Carbon & Gasoline Co., 347 F.2d 921 (8th Cir. 1965), the court held filing alone was sufficient to commence an action within the four-year federal statute of limitations for private actions under the federal anti-trust laws. The court based its holding on Rule 3, which it viewed as "unmistakedly stat[ing] in plain, clear, well-understood and unambiguous language that an action is commenced by filing the complaint." *Id.* at 922. The court also found justification for its holding in the fact that the statute of limitations was enacted subsequent to the effective date of Rule 3 and provided that actions would be barred unless "commenced" within four years. This, the court saw as further evidence that Congress intended to require only filing. *Id.* at 925. Nowhere in the opinion does the court express any reservation as to its conclusion that Rule 3 speaks to commencement for the purposes of a statute of limitations. "If Congress or the rule makers had intended to impose [an additional requirement], it would have been a simple matter to include the condition by appropriate language in the rule or the statute." *Id.*

2. 446 U.S. 740 (1980).

3. *Id.* at 750-51.

4. *Id.* at 753. In the same term the Court held in a civil rights action brought in federal court under 42 U.S.C. § 1983 (Supp. III 1979) that a state's tolling provision, as well as its statute of limitations, is to be applied unless inconsistent with federal policies underlying the cause of action.

ence only to state statutes of limitations, and the Court expressly avoided deciding the role of Rule 3 in regard to federal statutes of limitations.[5] It is difficult, however, to perceive any basis in the language of Rule 3 or in the reasoning of the Court for concluding that the role of the Rule would change according to the nature of the authority enacting the statute of limitations.[6]

The decision in *Walker* does, however, provide a warning to plaintiffs bringing actions in federal court based on diversity jurisdiction. They are told to bring those actions within the time provided by state statutes of limitations and to do so in accordance with state provisions defining commencement for limitations purposes, at least when those provisions constitute an "integral" part of the statute of limitations.[7] The *Walker* decision was also not the first United States Supreme Court decision giving this same warning. In 1949 in *Ragan v. Merchants Transfer & Warehouse Co.*[8] the Court decided, in an almost identical fact situation, that the *Erie* doctrine required the application of a similar state commencement provision in a federal diversity action. Application of the state rule was required because otherwise the outcome of the litigation would vary substantially from what it would have been had the action been brought in state court. Even though that holding was later brought into question,[9] no reasonable person, having read

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See Board of Regents v. Tomanio, 446 U.S. 478 (1980). Although at issue was the suspension of the running of the limitations period for the federal action during the pendency of a state court action, the Court concluded that the state tolling rule must apply to the federal action primarily because it was interrelated with the statute of limitations. *Id.* at 485-86. The Court in *Walker* viewed the state's commencement provision involved in that case as an "integral part" of its statute of limitations. 446 U.S. at 751-52. It seems clear, therefore, that had the Court in *Tomanio* been considering instead the applicability of this commencement provision, it would have required the application of this type of state rule also.

5. *Walker*, 446 U.S. at 751 n.11 (1980).

6. That is not to say filing alone cannot be sufficient if Congress, through the language of a particular federal statute of limitations, intended that to be the rule. *See* 347 F.2d at 925.

7. *See Walker*, 446 U.S. at 751-52. One gap in the reasoning of the Court arises because in holding Rule 3 inapposite it does not consider whether any federal judge-made rule is or could be applicable. One explanation for this gap, perhaps, is that any judge-made rule that would have aided the plaintiff in that case would still have given way to the state rule under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Without consideration of a pertinent federal rule, the *Erie* analysis by the Court is rather summary. *See Walker*, 446 U.S. at 752-53.

8. 337 U.S. 530 (1949).

9. The continuing authority of *Ragan* became a matter of debate among the lower federal courts after the Court's decision in Hanna v. Plumer, 380 U.S. 460 (1965). In *Hanna* the Supreme Court held that when a Federal Rule applied to a matter in issue even in the face of a conflicting state rule, the question was whether the Rule was a valid exercise of the rulemaking power under the Rules Enabling Act, 28 U.S.C. § 2072 (1976). *Id.* at 471-74. In this situation the *Erie* doctrine simply did not constitute the appropriate test. *Id.* at 469-70.

The issue arose because *Ragan*'s refusal to apply Rule 3 in the face of a conflicting state rule was on the basis of *Erie*, but the Court in *Hanna* distinguished *Ragan* as a case in which the scope of the Federal Rule was simply not as broad as the plaintiff had urged. *Id.* at 470 & n.12. This

that case, could thereafter feel safe in relying on Rule 3 as the controlling commencement provision in diversity cases. Yet, since 1949, ninety-one federal decisions in diversity cases have been reported in which Rule 3's application as the controlling commencement rule for a state statute of limitations has been in issue.[10] Although "tip of the iceberg" arguments can be carried too far, it does not seem unreasonable to suggest that the misreading of Rule 3 as a commencement provision has played a part in a number of cases that were settled because plaintiff learned of the probable insufficiency of filing for limitations purposes.

Knowing that state commencement provisions might apply in federal diversity actions does not solve the problem of finding the applicable state provision. In diversity actions federal courts must apply the choice of law or conflict of laws rule of the forum state.[11] To find which state will supply the applicable statute of limitations, therefore, requires application of the conflict of laws rules and principles established by the forum state.[12] Even when the law of the forum will supply the applicable commencement provision, some care is required since that state may have two provisions which appear to control commencement of a suit. In *Walker* the Court noted that the state had a

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distinction requires a strained interpretation of the basis of decision given in *Ragan* or at least some degree of rather enlightened hindsight. *Compare* Smith v. Peters, 482 F.2d 799, 801-02 (6th Cir. 1973) (compliance with Rule 3 commences suit for state limitations purposes), *cert. denied*, 415 U.S. 989 (1974) *and* Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 604-06 (2d Cir. 1968) (compliance with Rule 3 commences suit for state limitations purposes) *with* Groninger v. Davison, 364 F.2d 638, 642 (8th Cir. 1966) (state commencement provision rather than Rule 3 controls for state limitations purposes).

10. *See* Appendix to this article. Justice Douglas alluded to one reason for the continuing and frequent failure to act in accordance with the warning provided by Supreme Court decisions when he said, "Those who read this opinion may have adequate warning. But this opinion, like most, will become an obscure one—little known to the Bar." England v. Louisiana State Bd., 375 U.S. 411, 435 (1964) (concurring opinion). One might add that here, as opposed to issues involving abstention, there is a Federal Rule of Civil Procedure that appears clearly to provide guidance so that the usual tendency of a litigant to research judicial decisions is weakened.

11. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

12. When a choice of law rule of a state would require the application of the law of another state, only the substantive law of that state is to be applied—the procedural law of the forum remains applicable. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 49 (2d ed. 1980). Statutes of limitations, although generally considered procedural for choice of law purposes, are considered substantive when they are built into or contain specific reference to the particular cause of action. These general rules are superseded, however, when the forum state has promulgated a "borrowing" statute which directs application of statutes of limitations under stated circumstances. *See generally id.* at 59-67. Borrowing statutes, when they direct the application of another state's limitation period, will frequently require application be done under the "laws" of that state, including laws regulating tolling and other related provisions. *See* Speight v. Miller, 437 F.2d 781, 782-83 (7th Cir. 1971), *cert. denied*, 404 U.S. 827 (1971); Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MTN. L. REV. 287, 307-10 (1960).

general rule of procedure stating that an action is commenced by filing plus the issuance of summons, but this was not the rule applicable to commencement for limitations purposes. The applicable provision required, in addition, service of process within the limitations period or, in the alternative, an attempt to serve within that period plus actual service within sixty days thereafter.[13] The plaintiff was thus required to know that neither Rule 3 nor the general state provision meant what it appeared to mean.[14]

Failure to comply with a statute of limitations, unlike most procedural missteps in federal court, terminates the plaintiff's claim and does so for reasons having no direct relation to the justness of that claim on the merits. If the failure to comply with state commencement requirements can be proved a result of the negligence of plaintiff's lawyer, then perhaps plaintiff can replace his former cause of action with one for malpractice.[15] Even if this is so, the defendant, the one who allegedly caused harm to the plaintiff, may escape liability because of what may be nothing more than a technicality.[16] The Federal Rules generally reflect a rejection of the attitude that procedure is a game wherein the unwary can lose all. As Justice Black has written:

> These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.[17]

Likewise, when a rule of procedure misleads or hides more than it tells as to matters other than pleading, which have the potential for depriv-

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13. *See Walker*, 446 U.S. at 740 & n.13.

14. The court of appeals viewed the state provision providing for commencement for limitations purposes as "complex and even mysterious" and "technical and cumbersome" but felt compelled to apply it. *See* Walker v. Armco Steel Corp., 592 F.2d 1133, 1135 (10th Cir. 1979).

15. *See e.g.*, Wilcox v. Plumer, 29 U.S. (4 Pet.) 172, 183 (1830) (limitations expired before filing); Hillhouse v. McDowell, 219 Tenn. 362, 371, 410 S.W.2d 162, 166 (1966) (attorney liable for failure to bring action within limitations period); House v. Maddox, 46 Ill. App. 3d 68, 73, 360 N.E.2d 580, 584 (1st Dist. 1977) (legal malpractice for attorney to fail to file within limitations period); Fuschetti v. Bierman, 128 N.J. Super, 290, 294-95, 319 A.2d 781, 784 (1974) (failure to bring action within limitations period as evidence of neglect). If a legal technicality causes the running of a limitations period, the lawyer may not be liable for malpractice. *See In re* Watts, 190 U.S. 1, 32 (1903) (innocent error not considered negligence).

16. The characterization of the limitations defense as a technicality is further explained in the body of this article. In short, this characterization is legitimate when the defendant had full knowledge of the filing of the action within the limitations period but is saved by formal or technical requirements not satisfied by the plaintiff.

17. Sufowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966).

ing an unsophisticated or excusably-erring litigant of his day in court, it should be changed.

It is my contention that because Rule 3 provides litigants with inaccurate information pertaining to a crucial step in the process of adjudication it should be amended. A proposed amendment is, therefore, presented and discussed in the latter part of this article. Deciding that a Rule should be amended does not of course answer the question of how it should be amended. When the deceptive appearance of simplicity fostered by Rule 3 is peeled away one discovers a clutter of troublesome constitutional, statutory, and federalism problems that cannot be easily swept aside. They must be considered before a proposal can be formulated primarily because they most assuredly will be considered by the authorities responsible for promulgating and approving such a proposal as a Federal Rule of Civil Procedure. The body of this article is therefore dedicated to that task. First, however, it is necessary to clarify the legal terminology used in relation to statutes of limitations because the meaning of various of these terms is none too clear and because, after all, this article is more than just tangentially concerned with the meaning of legal words.

II. Limitations Terminology

Statutes of limitations fix time limits within which designated claims must be commenced.[18] Typically, the fixed period established by a statute of limitations is computed from the date on which the claim for relief arose or accrued, which would ordinarily be the date on which occurred the last event necessary to permit the bringing of an action in court to assert that claim.[19] To comply with the command of a statute of limitations, plaintiff must initiate or commence an action on his claim within the prescribed period or it will be barred.[20] In addition, a particular jurisdiction may provide for postponement of the beginning of a limitations period or for suspension of the running of the period under certain circumstances. For example, a person may not discover that his injuries are the result of a negligent act until long after

18. *See* Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944); Wood v. Carpenter, 101 U.S. 135, 139 (1879). "The lapse of years without any attempt to enforce a demand creates . . . a presumption against its original validity, or that it has ceased to subsist." Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868).

19. *See generally Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1200-20 (1950) [hereinafter cited as *Developments*].

20. *See* A.J. Phillips Co. v. Grand Trunk Ry., 236 U.S. 662, 667 (1915). "Under such a statute the lapse of time not only bars the remedy but destroys the liability . . . ." *Id.* at 667. *See also* Kansas City S. Ry. v. Wolf, 261 U.S. 133, 140 (1923); Davis v. Mills, 194 U.S. 451, 457 (1904). *See generally* Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1016-18 (1980).

that act has occurred; and, technically, once a negligent act has caused damage, a claim sufficient to allow suit arises. Under these circumstances some jurisdictions provide that the applicable statute of limitations will begin to run from the time plaintiff discovered or should have known that he was harmed by the negligence of defendant rather than from the time the negligence occurred.[21] The running of a limitations period may also be suspended for the period during which a defendant is outside the jurisdiction of the state.[22]

If an action is properly commenced within the limitations period, there may be further limitations problems raised by an amendment to the plaintiff's pleading that changes the cause of action or the parties. This question, in terms used by Rule 15(c) of the Federal Rules of Civil Procedure, is whether the amended complaint "relates back" to the date on which the action was brought under the original complaint.[23] An action commenced in compliance with the applicable statute of limitations may also fail for procedural or jurisdictional reasons either before or after the expiration of the limitations period. If it fails before the end of that period and plaintiff fails to recommence the action before the period expires, plaintiff may be able to successfully argue that the limitations period was suspended during the pendency of the first suit. If the original action is dismissed after the limitations period has expired, either suspension or a "savings" statute (allowing recommencement within a specified period) may preserve plaintiff's claim.[24]

"Tolling" is the term used generally to characterize rules that provide an exception to the mechanical calculation and application of a

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21. *See, e.g.*, White v. Schnoebelen, 19 N.H. 273, 275-76, 18 A.2d 185, 186-87 (1949) (period commences when lightning causes damage, not when lightning rod negligently installed); Cardin v. McClellan, 85 S.W. 267, 272-73 (Tenn. 1905) (period calculated from time vendee deprived of property, not from time of negligent filing of deed); Theurer v. Condon, 34 Wash. 2d 448, 455, 209 P.2d 311, 315 (1949) (period measured from time of fire, rather than time of negligent installation of fuel tank). *Contra* Powers v. Planters Nat'l Bank & Trust Co., 219 N.C. 254, 256, 13 S.E.2d 431, 432 (1941) (period commences when agent fails to disclose that premises are contaminated, not when lessee contracts tuberculosis).

22. *See, e.g.*, 28 U.S.C. § 2416(a) (1976) (all periods excluded during which defendant or *res* is outside the United States); Partis v. Miller Equip. Co., 324 F. Supp. 898, 900 (N.D. Ohio 1970) (savings statute tolls limitation period during defendant's absence); Byrne v. Ogle, 488 P.2d 716, 717-18 (Alaska 1971) (purpose of statute to prevent plaintiff from being deprived of opportunity to assert claim).

23. *See* Bemis Bros. Bag Co. v. United States, 289 U.S. 28, 35 (1933). *See generally* Note, *Civil Procedure—The Erie Doctrine and Relation Back of Supplemental Pleadings Under Rule 15(c)—Davis v. Piper Aircraft Corp.*, 16 WAKE FOREST L. REV. 621, 633-36 (1980). The test of whether amendment relates back, for limitation purposes, is notice; and inquiry should focus on notice given by general fact situation as set forth in original pleading. *See also* Rosenberg v. Martin, 478 F.2d 520, 526 (2d Cir. 1973); Oil Well Supply Co. v. First Nat'l Bank, 106 F.2d 399, 404 (10th Cir. 1939).

24. *See Developments*, *supra* note 19, at 1243-44.

limitations period, including rules regulating the actions necessary to commence a suit in compliance with a statute of limitations.[25] "Commencement," however, seems a more precise term for discussing these steps,[26] although its use may lead to some confusion since the Supreme Court's decision in *Walker*.[27] Even so, "commencement" is more likely than "tolling" to maintain a focus on the particular matters discussed in this article and has been generally understood to refer to the steps necessary for compliance with the command of a statute of limitations.[28] It is also less cumbersome than some of the alternatives in that it can be more easily and effectively used as both a noun and an adjective.

III. Constitutional and Statutory Restrictions on Congress's Enactment of Procedural Rules for Federal Courts

In *Hanna v. Plumer*,[29] the Supreme Court held in a federal court case based on diversity jurisdiction that Rule 4(d)(1)[30] of the Federal Rules of Civil Procedure was valid and controlling in the face of a conflicting state rule. Plaintiff in *Hanna* had complied with Rule 4(d)(1) by leaving copies of the summons and the complaint with defendant's wife at his residence, but the state rule required delivery in hand to an executor of an estate, which was the capacity in which defendant was sued. Defendant argued that to disregard the state rule would cause a substantial variance in the outcome of this litigation from what it would have been if brought in state court and that, therefore, under the rule of *Erie R.R. v. Tompkins*,[31] as refined in *Guaranty Trust Co. v.*

25. For example, in order to ensure an adequate remedy to an aggrieved person without the hardship of being forced to travel to a foreign jurisdiction to enforce his claim, the prescribed limitation period would run from the time that the alleged wrongdoer became subject to the jurisdiction of the forum state. *See* Chemung Canal Bank v. Lowery, 93 U.S. 72, 77 (1876). *See generally* Note, *Federal Rule 3 and the Tolling of State Statutes of Limitations in Diversity Cases*, 20 Stan. L. Rev. 1281 (1968).

26. Commencement defines the activity that more or less permanently tolls the statute of limitations. For a discussion of what constitutes "commencement" in various jurisdictions, see *Developments*, *supra* note 19, at 1237-44.

27. *See Walker*, 446 U.S. at 750.

28. *See* 347 F.2d at 922.

29. 380 U.S. 460, 473-74 (1965).

30. Fed. R. Civ. P. 4(d)(1) provides that service may be made:

> Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

31. 304 U.S. 64, 78 (1938).

York,[32] the state rule must be applied.[33] The Supreme Court in *Hanna* responded with the observation that *Erie* had never been invoked to void a Federal Rule of Civil Procedure,[34] distinguishing *Ragan v. Merchants Transfer Co.*[35] as a decision in which Rule 3 was held not to apply to the matter to be decided.[36]

In *Hanna* the Court held that *Erie* was not the appropriate authority for determining the validity of a Federal Rule because that case concerned the applicability of federal rules of general common law that were not authorized by any grant of federal authority in the Constitution.[37] *Erie* did not involve a Federal Rule but rather dealt with a question which was clearly "substantive."[38] In *Hanna* the question involved a Federal Rule of Civil Procedure promulgated pursuant to the Rules Enabling Act and Congress has constitutional authority to provide rules of practice and procedure for lower federal courts.[39]

Both article I and article III of the Constitution grant Congress power to create federal courts inferior to the Supreme Court.[40] In addition, the Necessary and Proper Clause of article I supports Congress's power to enact laws appropriate for carrying into execution these specific delegated powers.[41] The power to create lower federal courts therefore is augmented by the power to make rules controlling the procedural operation of those courts. The scope of these powers is not limited by reference to state powers except in the sense that only state power exists beyond the constitutional reach of Congress.[42] Therefore,

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32. 326 U.S. 99, 109-10 (1945).

33. 380 U.S. at 466:

> Reduced to essentials, the argument is:
> (1) *Erie*, as refined in *York*, demands that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case.
> (2) In this case, a determination that the Massachusetts service requirements obtain will result in immediate victory for respondent. If, on the other hand, it should be held that Rule 4(d)(1) is applicable, the litigation will continue, with possible victory for petitioner.
> (3) Therefore, *Erie* demands application of the Massachusetts rule.

34. *Id.* at 470.

35. 337 U.S. 530 (1949).

36. In *Ragan*, the Supreme Court held that the state rules of procedure controlled.

> But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.

380 U.S. at 470.

37. The Court in *Erie* held that no federal general common law can exist because no provision in the Constitution authorizes either Congress or the federal courts to "declare substantive rules of common law applicable in a State." 304 U.S. at 78.

38. 380 U.S. at 472.

39. *See* 28 U.S.C. § 2072 (1976).

40. U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1.

41. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-23 (1819).

42. The tenth amendment does not carve out any protected enclave of state powers. It simply

the fact that one of the Federal Rules conflicts with a state rule, even to the extent that its applicability substantially varies the outcome of litigation as between federal and state courts, does not make the Rule constitutionally invalid.[43] The constitutionality of a Federal Rule simply does not turn on a substantive-procedural distinction.[44] The Necessary and Proper Clause would be insufficiently elastic to support a Rule that was clearly not procedural.[45] Such a Rule would be challenged, however, as being beyond the need for efficient operation of a national court system in that it was not sufficiently related to the oiling of the mechanical process of adjudication.[46] In the conclusory sense only would it be substantive, assuming any law which is not procedural must necessarily be substantive.

The difficulty in determining the scope of congressional power by reference to a substantive-procedural distinction is that no clear, easily-applied test exists for making this distinction.[47] Congress cannot achieve its purposes in providing uniform rules of procedure[48] if those rules are vulnerable to frequent constitutional challenge on the basis of such an amorphous distinction. In recognizing this danger, the Court in *Hanna* held that Congress's power included the power to regulate matters "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[49] Justice Harlan, concurring in *Hanna*, accurately characterized this as an "arguably procedural, *ergo* constitutional" test, which he contended went too far.[50] Although Congress could conceivably abuse

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makes explicit that which was implicit in the Constitution of 1787—powers not delegated to federal government are left to the states. *See* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701-04 (1974). The tenth amendment does, however, protect certain traditional powers of the state: "Congress may not exercise [the commerce] power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." National League of Cities v. Usery, 426 U.S. 833, 855 (1976). Before a federal statute violates this prohibition, it must satisfy each of three requirements: (1) regulate state government institutions directly ("States as States"); (2) address matters indisputably "attributes of state sovereignty," and (3) directly impair the state's ability "to structure integral operations in areas of traditional functions." Hodel v. Virginia Surface Mining & Recl. Ass'n, 101 S. Ct. 2352, 2366 (1981). Regulation of federal procedure clearly fails to satisfy the first requirement.

43. *See* 380 U.S. at 472: "Neither *York* nor the cases following it ever suggested that the rule there laid down for coping with situations where no Federal Rule applies is coextensive with the limitation on Congress to which *Erie* had adverted."

44. *See* Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105, 1123 (E.D. Ky. 1980).

45. *See id.* at 1123 n.98.

46. *See id.*

47. Erie makes no clear-cut distinction between substance and process. *See* 304 U.S. at 74. *York* stands for the proposition that the outcome should be substantially the same if tried in a federal court as it would have been had the case been tried in state court. *See* 326 U.S. at 107-10.

48. *See* Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116, 1124 (1934).

49. 380 U.S. at 472.

50. *See id.* at 476.

its powers by using procedure as a pretext,[51] that possibility is not a reason for denying it ample means by which to provide for the efficient operation of the federal court system or for requiring dependence on the states for these purposes.[52] The rationality test established by *Hanna* (or the arguably procedural test) provides Congress ample leeway under the Constitution to establish procedural rules even though those rules may supplant arguably substantive state rules on occasion.[53] Whether Congress, in enacting the Rules Enabling Act of 1934,[54] meant to exercise its full constitutional power, however, is another question.

A. *Ely's Interpretation of the Rules Enabling Act*

Although the struggle for procedural reform in the federal courts leading to the Enabling Act began as early as 1911[55] it was stalled by opposition which feared, in part, that federal rules would impose a more complicated system of procedure than that developed in some states.[56] When the bill that became law was introduced, however, its passage was surprisingly rapid and without substantial opposition.[57]

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51. *See* 17 U.S. (4 Wheat.) at 423:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

52. *See id.* at 424:

> No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.

53. The scope of this power is not thereby unlike the scope of the commerce power which allows intrusion on state powers over "local" matters. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-30 (1937).

54. 28 U.S.C. § 2072 (1976).

55. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1003, at 40 (1971).

56. *See id.* at 41.

57. "The actual enactment of the bill was astonishingly casual . . . . The discussion in the two houses consumed only a few minutes each." Attorney General Homer S. Cummings had sent a letter to the judicial committees of each House recommending the bill so as to bring about "uniformity and simplicity in the practice in actions at law in Federal courts and thus relieve the courts and the bar of controversies and difficulties which are continually arising wholly apart from the merits of the litigation in which they are interested." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 673-74 (1973); *see* 78 CONG. REC. 9362-63 (1934); 78 CONG. REC. 10,866 (1934).

The Enabling Act delegates power to the Supreme Court to prescribe by general rules the practice and procedure of the lower federal courts.[58] Under the Act these rules cannot come into effect until the expiration of ninety days after they have been reported to Congress by the Chief Justice. The second sentence of the Act, in its present form, states that these rules "shall not abridge, enlarge or modify any substantive right."[59] The original Act, prior to its revision in 1948, had included the phrase "of any litigant" following "substantive right."[60]

Professor John Hart Ely has argued that the second sentence imposes a substantive-procedural distinction not found in the constitution which, unless it is to be rendered meaningless,[61] must be seen as evidence that Congress intended to limit the scope of the power delegated to the Supreme Court.[62] This substantive-procedural distinction, however, is not to be determined under the *Erie-York* analysis, but rather under an analysis of the scope of the constitutional and statutory authority to prescribe Federal Rules,[63] as the Court recognized in *Hanna*. The Enabling Act was clearly intended to be the authority for a set of rules to be applied in federal courts regardless of the basis of subject matter jurisdiction. If the *Erie* test were applied to the Federal Rules, this intent would be substantially frustrated since the application of many of the Rules in lieu of contrary state rules would be outcome determinative.[64]

Professor Ely's reasoning proceeds as follows: (1) the Constitution imposes no "substantive" restriction on Congress's rulemaking power and would allow modification of substantive rights to some extent; (2) the Enabling Act in imposing such a restriction on the Federal Rules therefore evidences Congress's intent to exercise less than all of its constitutional rulemaking power; and (3) this limitation in the Enabling Act was not meant to be defined by reference to the Rules of Decision Act as interpreted in *Erie* and its progeny. To further support step three, Professor Ely points out that once the constitutional basis for the Enabling Act is established, that Act stands as the more recent statute and, therefore, is controlling as to inconsistencies between it and the Rules of Decision Act, which is the statutory basis of *Erie*. More-

58. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1976)).

59. 28 U.S.C. § 2072 (1976).

60. Act of June 19, 1934 Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1976)).

61. *See* Ely, *supra* note 42, at 724 n.171.

62. *See* Ely *supra* note 42, at 718-19. The act imposes the enclave theory restriction to protect state-created substantive rights. *See* 497 F. Supp. at 1123.

63. 380 U.S. at 473-74.

64. *See* Ely, *supra* note 42, at 721.

over, the Rules of Decision Act itself directs federal courts to apply state law except when "Acts of Congress otherwise require or provide."[65] Furthermore, the Enabling Act contains the statement that all laws in conflict with the Federal Rules shall be of no further force or effect.[66]

The next step in Professor Ely's reasoning is the determination of the nature of the substantive rights protected under the Enabling Act or, more precisely, the formulation of a test for determining when a Rule runs afoul of the Enabling Act's independent substantive-procedural distinction. He proposes we begin by looking to the character of the state provision to be supplanted by the enforcement of a Federal Rule.[67] If that state provision embodies a substantive policy rather than simply a different view of what is the fairest and most efficient mode of conducting litigation,[68] the Federal Rule should not be applied.[69] A substantive policy or, more particularly, a right derived from such a policy, is to be defined "as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[70] Professor Ely places emphasis on the purposes or policies of the state rule because he assumes the subversion of state substantive policies was what Congress by the second sentence of the Act sought to avoid.[71] Recognizing that a state provision can have both procedural and substantive goals, he argues that the attempt must be to identify that goal which transcends concern for the conduct of litigation.[72] If that nonprocedural goal is frustrated by the application of a Federal Rule, the specific prohibition of the second sentence of the Enabling Act overrides the general power of the first sentence.[73] The goals or purposes protected thereby are defined, under Professor Ely's analysis, primarily as those which are nonprocedural, which makes unnecessary the further step of independently

65. 28 U.S.C. § 1652 (1976).

66. *See* 28 U.S.C. § 2072 (1976). A Federal Rule may not enjoy the same status as an Act passed by the Congress and signed by the President, but it does override those rules requiring adherence to state procedure. *See* Walko Corp. v. Burger Chef Sys., Inc., 554 F.2d 1165, 1168 n.29 (D.C. Cir. 1977); *cf.* Buckley v. Valeo, 424 U.S. 1, 284 (1976) (White J., concurring in part, dissenting in part).

67. *See* Ely, *supra* note 42, at 722.

68. *Id.*

69. *See id.* at 734.

70. *Id.* at 725.

71. *See id.* at 724 n.170. He also recognizes that a focus on a Rule's effects would make any test either unintelligible or would lead to the wholesale defeat of Congress's attempt to establish uniform rules since any rule can arguably have procedural and substantive effects. *See* 497 F. Supp. at 1123.

72. *See* Ely at *supra* note 42, at 726.

73. *See id.* at 719, 734.

identifying them as substantive.[74] Moreover, he carefully avoids the need to look to the often nonexistent legislative history[75] of a state provision by looking instead to the language of the state provision itself to find evidence of its purposes.[76]

In applying his test to *Ragan v. Merchants Transfer & Warehouse Co.*,[77] Professor Ely finds that the Court in applying a state provision requiring service of process, instead of Rule 3, to determine whether that diversity action was properly commenced was correct but for the wrong reason.[78] The Court mistakenly applied the *Erie* rule to decide the case but by refusing to apply Rule 3 had, in effect, protected a nonprocedural policy of the state commencement provision. One of the purposes of a statute of limitations, which is directly served by a service requirement, is the protection of a potential defendant's right to "breathe easy" after the expiration of the limitations period.[79] To find that only the filing of a complaint within that period was required would have frustrated that policy and the right engendered thereby. The fact that perhaps only a minor delay in giving the defendant notice would result was not seen by Professor Ely as significant since "the difference between the actual provisions was a difference between notice and no notice, and that goes to the essence of the right the state legislature seems to have been trying to create."[80]

Once one encounters the compelling clarity of Professor Ely's thinking it is difficult to break free of its spell, but his conclusion, if accepted, would cause lawyers some substantial research problems. In a diversity case one must first identify the state rule to be supplanted by an applicable Federal Rule. This would not be difficult if the conflicting state provision were contained in a well-indexed code of state procedure. As has been noted the existence of one such state rule does not, of course, foreclose the possibility that another rule on the subject might exist.[81] Even a state rule contained in a body of procedural rules may have nonprocedural purposes. For example, Professor Ely suggests that the broad scope of discovery allowed under rule 26(b)(1) of the Federal Rules might well be subject to an Enabling Act challenge if a state's narrower discovery provisions were based on concerns for

74. *See id.* at 725 n.172.

75. *See id.* at 724 n.171.

76. *See id.* at 726.

77. 337 U.S. 530 (1949).

78. *See* Ely, *supra* note 42, at 730.

79. *Id.* at 731.

80. *Id.* at 731 n.203.

81. See text accompanying notes 12 and 13, *supra*.

privacy.[82]

If research revealed no state procedural or statutory provision on the subject, then research of state court decisions would be required to determine why the state legislature has not spoken on the matter. In applying his analysis to the facts of *Sibbach v. Wilson & Co.*,[83] Professor Ely suggests that if the Court had found the otherwise applicable state law did not provide for the medical examination ordered in that case pursuant to Rule 35, it should have proceeded to determine why this was so.[84] He then discusses the possible reasons for such a failure; but he omits an important step, that is, finding the state authority for those reasons. If a state's highest court has elaborated on the reasons for the state's refusal to allow medical examination of litigants, a less sophisticated lawyer than Professor Ely could perhaps carry out his analysis. This may often not be the case. A substantial problem often encountered in diversity cases is simply determining what the court-made law of a state is on a particular subject when the state's highest court has not decided the matter. An extensive body of federal law has been created, under the label of *Pullman* abstention, to deal with cases in which part of the federal court's problem is caused by unclear state law.[85]

If the potentially applicable state law can be identified with some degree of certainty, one could then proceed to identify the arguably nonprocedural purposes or goals of that law. We can assume that if the Court accepted Professor Ely's argument, his test would receive judicial elaboration and, hopefully, competent lawyers could use it with some degree of proficiency. Those lawyers, being competent, would also be able to generate substantial extra federal pretrial and appellate litigation on the rather subtle issues necessarily inherent in this mode of analysis. Of course, to this point we have considered only the need to research the law of one state; but modern choice of law rules, in their focus on significant contracts, open the door to the possibility that forum choice among states could determine which state's law was potentially applicable.[86] Plaintiff's lawyer would then need to research the

82. Ely, *supra* note 42, at 722 n.162.

83. 312 U.S. 1 (1941).

84. *See* Ely *supra* note 42, at 734. In *Sibbach* the petitioner challenged the authority of the lower federal court to order her to submit to a medical examination as it was authorized to do by Rule 35 of the Federal Rules of Civil Procedure. She admitted that Rule 35 was a rule of procedure but contended that it abridged her substantive rights in violation of the second sentence of the Rules Enabling Act. The law of the state in which the cause arose allowed such examinations, but the forum state did not. 312 U.S. at 6-11.

85. *See generally* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

86. *See generally* R. WEINTRAUB, *supra* note 12, at 566-69.

law of those states in which suit might be brought.[87]

Although the failure to discover or perceive a state substantive policy might not cause every federal litigant to lose his lawsuit, no litigant in federal diversity cases could afford to rely on the Federal Rules without extensive, additional research and without suffering a great deal of anxiety. One of the primary purposes for establishing uniform federal procedural rules was to avoid having a different federal procedure in each state.[88] The Enabling Act was intended also to provide readily ascertainable rules that would facilitate the interstate practice of law.[89] To accomplish this goal the Rules were shaped by the notion that what was needed was a simplified practice without unnecessary technicalities or distinctions so that litigation in federal court could proceed efficiently and inexpensively to an adjudication on the merits.[90] Should Professor Ely's test be accepted, those important purposes would be substantially frustrated.[91]

B. *The Federal Rules of Civil Procedure Should Be Presumed Valid*

The Supreme Court has refused to construe the delegation of power to administrative agencies so as to defeat the manifest purpose of the delegating Act.[92] It has, in fact, sought to construe such statutory powers in light of the complexity of the subject matter to be regulated and the resulting need for flexible regulatory powers.[93] As the Court stated in *Yakus v. United States*, "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers."[94]

Neither Congress nor the Court need show even this level of concern in determining whether a Federal Rule is within the delegation of the Enabling Act because, unlike most instances of delegation, that Act requires the reporting of any proposed rule to Congress before it can

87. There would, of course, be restrictions as to personal jurisdiction but *International Shoe* and its progeny and state long-arm statutes would still provide leeway. *See* International Shoe v. Washington, 326 U.S. 310 (1945).

88. Lumbermen's Mutual Casualty Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963), cited with approval in Hanna v. Plumer, 380 U.S. 460, 472-73 (1965).

89. 497 F. Supp. at 1120.

90. Address of Attorney General Cummings to Judicial Conference, Fourth Circuit (June 6, 1935), *reprinted in* 21 A.B.A.J. 403 (1935). *See* FED. R. CIV. P. 1 ("They shall be construed to secure the just, speedy, and inexpensive determination of every action.").

91. Consider this prospect in light of the fact 39,315 diversity cases were commenced between June 30, 1979 and June 30, 1980. *See* THE LAWYER'S ALMANAC 1981-1982: A CORNUCOPIA OF INFORMATION ABOUT LAW, LAWYERS AND THE PROFESSION 536.

92. Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 283-84 (1933).

93. *See* NBC v. United States, 319 U.S. 190, 219-20 (1943).

94. Yakus v. United States, 321 U.S. 414, 425-26 (1944).

become effective. Once reported, Congress has a period of time within which it can review and, if it so desires, veto a proposed rule. In this way, Congress enjoys the benefit of the expertise of the Court and the Advisory Committee in promulgating procedural rules yet still retains final control in evaluating the particulars of any proposal.[95] It is this power of final review that provides the means by which Congress can avoid the subversion of state or federal policies. Congress has, in fact, exercised this power in dramatic fashion by staying the effective date of the Federal Rules of Evidence.[96] When it finally enacted the Federal Rules of Evidence,[97] it also enacted a statute to govern amendments to those Rules.[98] In that Act Congress retained an extensive review power. Consequently, Congress need not rely on any inflexible standard gleaned from the words of the Enabling Act; it can take such action as it sees fit through the exercise of its waiting period veto power. By the active use of this power, Congress can protect those interests to be affected by a proposed rule and do so before that rule becomes part of the Federal Rules of Civil Procedure.

Furthermore, when Congress enacted the Rules Enabling Act in 1934, it could not have been so singularly concerned with the subversion of state substantive law.[99] To begin with, the Enabling Act does not expressly prohibit the modification of *state* substantive rights. The original version of the Act prohibited modification of the "substantive rights of *any* litigant."[100] One commentator noted in 1935 that this provision was possibly a reference to the distinction made under the Conformity Act in determining whether state procedural law was to be used in federal court.[101] The Conformity Act of 1872 had required federal district courts to conform generally to the practice, pleadings, and

95. This "waiting period" type of legislative veto allows Congress to control policy as the need develops rather than in advance by the establishment of elaborate standards. *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1373 (1977). The veto power is a method by which Congress can insure that rule-making is consistent with its intent. *Id.* at 1417. There was also some existing authority to allow Congress confidence that the waiting period veto retained in the Rules Enabling Act was constitutional at least when the veto was exercised through legislation. *See* 37 Op. Att'y Gen. 56, 63 (1933).

96. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (*reprinted in* 28 U.S.C. § 2071 (1976) as noted to that section).

97. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (*reprinted in* 28 U.S.C. § 2071 (1976) as note to that section).

98. 28 U.S.C. § 2076 (1976).

99. Ely, *supra* note 42, at 724 n.170. Professor Ely assumes that it was the subversion of state substantive policies that the framers of the Enabling Act wished to avoid.

100. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1976)).

101. *See* Sunderland, *Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A.J. 404, 405 (1935).

modes of proceeding existing in the states in which they were located when they heard civil cases other than equity and admiralty, unless some other Act of Congress provided otherwise.[102] During this same period the federal courts, under the rule of *Swift v. Tyson*,[103] engaged in the creation and application of general federal common law in diversity cases at the expense of the otherwise applicable substantive law of the states.[104] It was not until four years after the Enabling Act was passed that *Erie R.R. v. Tompkins* made sensitivity for state substantive rights the centerpiece of any discussion of federal adjudication in diversity cases.

The Enabling Act was also passed shortly after the first wave of New Deal legislation during which Congress had vigorously exercised its power in an attempt to solve the economic depression.[105] Moreover, it was not until one year after the passage of the Act that the Supreme Court, for the first time in American history, invalidated a federal law because of an unlawful delegation of legislative power by Congress.[106] Congress had little reason therefore, after so recently flexing its constitutional muscles, to be so cautious as to rigidly circumscribe the rulemaking power it granted the Supreme Court and over which it retained ultimate control.

What then did it mean to do by including in the Enabling Act what is now its second sentence? If one begins by recognizing that lawyers all too often define procedure by its relation to, or in contrast to, substantive law, we can better understand the language of the Enabling Act. After stating in the Act that the rules were to regulate "the forms of process, writs, pleadings, and motions, and the practice and procedure" in civil actions, Congress would naturally wish to clarify the scope of power granted by further stating, with what must have seemed then and now to be the best term available, that these rules are not to create or abridge substantive rights.[107] Congress, in the first sentence, listed a number of the matters to be regulated by these rules rather than simply providing for the prescribing of *procedural* rules. It follows therefore that the second sentence would speak only of matters *not* to be regulated—that is, substantive rights rather than substantive *rules*.

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102. Chisholm v. Gilmer, 299 U.S. 99, 102 (1936).

103. Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842).

104. Even under *Swift*, state statutory law was to be applied in diversity cases, but the application of a state statute was not determined by the use of a substantive-procedural distinction. *See id.* at 18.

105. E. BARRETT, CONSTITUTIONAL LAW CASES AND MATERIALS 220 (1977).

106. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); *see* Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 658 (1946).

107. *See* 28 U.S.C. § 2072 (1976).

Viewed in this light the second sentence is not a special insistence on protection for substantive rights but is instead an attempt to use those terms as a negative characterization of the rulemaking power to be exercised. In short, the language of the Enabling Act just as easily supports the proposition that Congress intended to exercise thereby the whole of its constitutional power over federal civil procedure.

As the Court stated in *Sibbach*, the "new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."[108] In that opinion the Court read the first and second sentences of the Act to stand for the proposition that the Supreme Court was not to regulate substantive rights in the "guise" of regulating procedure.[109] In other words, the Court may not under the pretext of prescribing procedural rules go beyond Congress's constitutional power to provide for the mechanical process of adjudication in the lower federal courts. The Court in *Sibbach* stated that the test under the Act is "whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[110] Moreover, the Supreme Court stated in *Hanna* that questions "concerning the scope of the Enabling Act *and the constitutionality* of specific Federal Rules [are to be decided] in light of the distinction set forth in *Sibbach*."[111]

Congress, therefore, has attempted through the Enabling Act to provide for the exercise of its full constitutional power over federal procedure, including the power to regulate matters or rights which fall within the "uncertain area between substance and procedure."[112] One might argue that if substantive rights can be identified, they are not within an "uncertain area." The fallacy of this argument lies in the assumption that in the gray area between substantive and procedural law, substantive rights can be identified through scientific inquiry with some degree of unanimity. Professor Ely's article represents perhaps the most sophisticated attempt to provide such a scientific test; but besides the practical difficulty of application, it also involves subtleties that would often lead to opposite conclusions. Furthermore, the time for this inquiry is before a Rule becomes effective. If the potential effect on an identified substantive right has not been brought to the atten-

108. 312 U.S. at 14.

109. *Id.* at 10. *See* text accompanying notes 51-53, *supra*.

110. *Id.* at 14.

111. 380 U.S. at 470-71 (emphasis added).

112. *Id.* at 472.

tion of the Supreme Court and Congress before this point they would have acted in that "uncertain" area to promulgate the new Rule. In other words, a Rule that has survived the multi-step process necessary for its approval, during which its effects have been considered, should be presumed valid to the extent of its application under both the Constitution and the Enabling Act unless no rational basis exists for classifying it as a procedural rule.[113]

Prior to final approval, a proposed rule can be changed to accommodate substantive rights identified as Professor Ely suggests. When substantive or other policies are protected at this stage from subversion by a proposed and arguably procedural rule, they can be protected because of current considerations without the need to refer to limitations supposedly frozen in place within the Enabling Act. Protection provided in this way would also not undercut the purposes of the Federal Rules, and litigants could rely on those Rules so as to efficiently bring their cases to adjudication on the merits.

Presuming the Rules valid does not result in the sacrifice of substantive rights because the federal courts can and do refuse to interpret Rules broadly when to do so would displace otherwise applicable substantive law.[114] The Supreme Court in *Walker* stated, however, that the Rules were not to be interpreted contrary to their plain meaning and that if a conflict arose between a Rule and state law, the analysis of *Hanna v. Plumer* was to be applied.[115] Moreover, many of the Rules expressly accomodate state law by providing for its control[116] or by providing for its use as an alternative means of proceeding.[117]

State substantive rights are therefore protected by the Supreme Court and the Advisory Committee through a process of sensitive drafting of proposed rules, including participation by the legal profes-

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113. *See Id.*; Westen & Lehman, *Is There Life for Erie after the Death of Diversity?* 78 MICH. L. REV. 311, 364 (1980).

114. *See, e.g., Walker*, 446 U.S. at 751 (Rule 3 not a commencement); Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (affirmative defenses not created by Rule 8(c)); Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963) (amenability to service not established by Rule 4(d)(7) or 4(a)); Covel v. Safetech, Inc., 90 F.R.D. 427, 433 (D. Mass. 1981) (application of substantive state rule more liberal than Rule 15(c)).

115. *Walker*, 446 U.S. at 750 n.9.

116. *See, e.g.*, FED. R. CIV. P. 4(d)(2) (service upon an infant or incompetent person in the manner prescribed by law of state in which service is made); FED. R. CIV. P. 17(b) (capacity of individual determined by law of domicile).

117. *See, e.g.*, FED. R. CIV. P. 4(d)(7) (service upon individuals or corporations in the manner prescribed by the law of the state in which district court is held); FED. R. CIV. P. 4(e) (service upon party not an inhabitant or found within the state in accordance with statute or rule of court of state in which district court is held); FED. R. CIV. P. 27(a)(4) (deposition before action admissible if admissible in courts of state where taken); FED. R. CIV. P. 45(e) (service of subpoena according to statute or rule of court).

sion and the public; by Congress through the use of its review and veto power over proposed rules; and by the courts through the enlightened use of their power of interpretation. To also require that a clearly applicable Rule be disregarded because of an effect on an arguably substantive right would amount to a rigid adherence to a concept of states' rights that is blind to legitimate needs for the efficient and inexpensive adjudication of actions in federal courts.[118]

IV. Considerations for Redrafting Rule 3 Substantive State Policies—Service and Notice Requirements

A proposed amendment to Rule 3 must, at a minimum, constitute a rule that would be rationally capable of being characterized as procedural. More precisely, it must be reasonably related to the mechanics of the judicial process of adjudicating rights and liabilities; then the proposed Rule would be within Congress's constitutional rulemaking power and also valid under the Rules Enabling Act. Beyond constitutional and statutory considerations, however, lie the legitimate policy concerns that will have significance in determining whether any proposed change in the Federal Rules will survive the multi-step process necessary for approval. Obviously, the primary concern in proposing to make Rule 3 a commencement provision for purposes of statutes of limitations is that such a Rule might supplant contrary state commencement provisions representing substantive policy decisions. These substantive policies therefore must be identified and considered in the drafting of this proposal.

A. *Actions Required of the Plaintiff and Their Purposes*

State laws regulating commencement of an action for limitations purposes vary widely in regard to the action required of the plaintiff.[119]

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118. *Cf.* Younger v. Harris, 401 U.S. 37, 44 (1971) (federalism does not require blind deference to state's rights).

119. *See* ALA. R. CIV. P. 3 (1977) (filing of complaint), *construed in* Ward v. Saben Appliance Co., 391 So.2d 1030, 1035 (Ala. 1980) (filing of complaint within limitations period with intent to have process immediately served); ALASKA R. CIV. P. 3 (1978) (filing of complaint); ARIZ. R. CIV. P. 3, 6(f) (1981) (filing of complaint), *construed in* Murphey v. Valenzuela, 95 Ariz. 30, 32-33, 386 P.2d 78, 80-81 (1963) (filing commences action but failure to use due diligence in obtaining service may cause abatement); ARK. STAT. ANN. § 27-301 (1979) (filing complaint and placing summons in hands of sheriff of proper county); CAL. CIV. PROC. CODE § 350 (Deering 1972) (filing of complaint); COLO. R. CIV. P. 3 (Supp. 1980) (filing a complaint or service of summons); Broderick v. Jackman, 167 Conn. 96, 98, 355 A.2d 234, 235 (1974) (writ served on defendant); DEL. SUPER. CT. CIV. P.R. 3(a) (1975) (filing of complaint and praecipe directing issuance of writ), *construed in* Russell v. Olmedo, 275 A.2d 249, 250 (Del. 1971) (to commence tolling statute of limitations, must also diligently seek to bring defendant into court); D.C. CODE ANN. § 11-946 (1981) (Federal Rules of Civil Procedure applicable); FLA. R. CIV. P. 1.050 (West 1967) (filing of complaint or

A large number of states require only the filing of the plaintiff's plead-

petition); GA. CODE ANN. § 81-112 (1956) (repealed for certain purposes by GA. CODE ANN. § 81-1506 (Supp. 1980)) (filing of petition); HAWAII REV. STAT. § 657-22 (1976) (issuance of process with intent it be served); IDAHO CODE § 5-228 (1979) (filing of complaint); ILL. ANN. STAT. ch. 110 ¶ 13(1) (Smith-Hurd 1968) (filing of complaint); IND. R. TR. P. 3 (Burns 1973) (filing of complaint); IOWA R. CIV. P. 48 (Supp. 1981) (filing of complaint); KAN. CIV. PRO. CODE ANN. § 60-203 and § 61-1703 (Vernon 1976) (filing of petition if service is obtained within 90 days, otherwise time of service); KY. REV. STAT. § 413.250 (1972), KY. R. CIV. P. 3 (1972) (issuance of first summons or process in good faith); LA. REV. STAT. ANN. § 9-5801 (West, Supp. 1981), LA. CODE CIV. PROC. ANN. art. 421 (West 1960) (filing of plaintiff's pleading in proper court); ME. REV. STAT. ANN. tit. 14 § 553 (West 1980), ME. R. CT. 3 (West 1980) (service or filing of complaint, whichever occurs first); MD. R. PRC. 140 & 170 (1977) (filing of original pleading); MASS. R. CIV. P. 3 (1974) (filing of complaint and entry fee); MICH. G. CT. R. 101 (1976); MICH. STAT. ANN. § 27A.5856 (1979), *construed in* Buscaino v. Rhodes, 385 Mich. 474, 189 N.W.2d 202 (1971) (filing of complaint); MINN. R. CIV. P. 3.01 (1979) (service or delivery of summons to proper officer if service completed within 60 days); *In re* Estate of Stanback, 222 So.2d 660, 662-63 (Miss. 1969) (petition must be presented to clerk with intent summons issue without delay); MO. R. CIV. P. 53.01 (Vernon 1976) (filing of complaint), *construed in* Votaw v. Schmittgens, 538 S.W.2d 884, 886 (Mo. App. 1976) (filing of complaint plus due diligence in obtaining service); MONT. CODE ANN. § 20 (1979), MONT. R. CIV. P. 3 (1979) (filing of complaint); NEB. REV. STAT. § 25-217 (1979) (filing of petition if service obtained within six months); NEV. R. CIV. P. 3 (1979) (filing of complaint); Clark v. Slayton, 63 N.H. 402, 1A.113 (1885) (filing with intent writ be served); N.J. R. CIV. P. 4:2-2 (1969), *construed in* Farrell v. Votator Div. Chemetron Corp., 62 N.J. 111, 299 A.2d 394 (1973) (filing of complaint); N.M. R. CIV. P. 3 (1978), *construed in* Prieto v. Home Educ. Livelihood Program, 94 N.M. 738, 616 P.2d 1123 (N.M. Ct. App. 1980) (filing of complaint); N.Y. CIV. PRACT. LAW § 203 (a,b) (McKinney 1972) as amended (McKinney Supp. 1981) (service of process generally); N.C. R. CIV. P. 3 (1969) (filing of complaint or issuance of summons); N.D. CENT. CODE § 28-01-38 (1974) (service of process or delivery of summons to proper officer with intent it be served if thereafter within 60 days it is served); N.D.R. CIV. P. 3 (1971) (commence by service of summons); OHIO REV. CODE ANN. § 2305.17 (Baldwin 1971), OHIO R. CIV. P. 3 (Baldwin 1971) (filing of petition and praecipe if service is obtained within one year); OKLA. STAT. ANN. tit. 12, § 97 (West Supp. 1981) (service of process or diligent attempt to procure service if service is obtained within 60 days); OR. REV. STAT. § 12.020 (1979) (service of process or filing of complaint if service is obtained within 60 days); PA. STAT. ANN. tit. 42, § 1007 (Purdon 1975), PA. R. CIV. P. § 1007 (West 1981) (filing a praecipe for writ of summons); R.I. GEN. LAWS § 9-1-12 (1970) (filing, depositing in mail addressed to clerk or delivered to officer for service), *construed in* Caprio v. Fanning & Doorley Constr. Co., 243 A.2d 738 (R.I. 1968) (filing of complaint with due diligence in seeking service); S.C. CODE ANN. § 10-101, 10-401 (Law. Coop. 1976) (service of summons), *construed in* First Nat'l Bank v. Hair, 20 S.E.2d 219 (S.C. 1942) (delivery of summons to sheriff with intent it be served is sufficient); S.D. COMP. LAWS ANN. § 15-2-30 (1967) (service of summons); TENN. R. CIV. P. 3 (1981) (filing of complaint with diligence in seeking issuance and service); TEX. R. CIV. P. 22 (Vernon 1981) (filing of petition), *construed in* Strickland v. Denver City, 559 S.W.2d 116 (Tex. Civ. App. 1977) (filing plus due diligence in procuring issuance and service required); UTAH R. CIV. P. 3(a) (1977) (filing or service); VT. R. CIV. P. 3 (1971) (filing a complaint), *construed in* Weisburgh v. McClure Newspapers, Inc., 396 A.2d 1388 (Vt. 1979) (timely service must also be accomplished); VA. S. CT. R. 3.33 (1977) (filing of original pleading); WASH. REV. CODE ANN. § 4.16.170 (1971) (filing of complaint or service of summons whichever occurs first), *construed in* Fox v. Groff, 16 Wash. App. 893, 559 P.2d 1376 (3d Div. 1977) (filing is sufficient only when service is subsequently effected within the statutory period and within 90 days of such filing); W. VA. R. CIV. P. 3 (1978) (filing of complaint); WIS. STAT. ANN. § 801.02(1) (West 1981) (filing of summons and complaint if service is obtained within 60 days); WYO. R. CIV. P. 3 (1979) (filing of complaint if service is obtained within 60 days, otherwise when service is obtained).

ing or filing followed by due diligence in seeking to obtain service. Some states require filing plus the issuance of summons with intent it be served and others require filing plus service of process. A number of states do not require that filing precede service and may therefore require either filing or service to commence an action. Filing may also be deemed the act of commencement only when service is obtained within a set period thereafter. At least twelve states require service within a calculable period, and a substantial number of others put emphasis on the use of diligence in obtaining service on the defendant in order to properly commence an action.

Since a commencement provision plays a significant role in the application of the state's statute of limitations, the policies it promotes must be ascertained by reference to the part it plays in the whole of the state's limitations policy.[120] It has been said that the primary purpose of a statute of limitations is to protect defendants.[121] A statute of limitations is, in this sense, a legislative decision that after the specified period a defendant should be able to assume he is free of liability and should not thereafter be required to muster his defenses. The limitations period is also, at least in part, a recognition that after a certain time evidence may have been lost to the defendant because of the fading of memories or the disappearance of witnesses.[122] Moreover, by

120. Determining when a particular provision is an "integral" part of a state's limitations policy is also a matter of some difficulty for the plaintiff in federal court. Prior to the *Walker* decision the lower federal courts had looked to a variety of factors to determine whether a commencement provision was an integral part of a state statute of limitations. The federal courts have looked to language in state court decisions on this issue, *see* Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1122 (10th Cir. 1979); Prashar v. Volkswagen of America, Inc., 480 F.2d 947, 951 (8th Cir. 1973); whether the provision was contained in the same article or chapter as the statute of limitations, as opposed to being part of the state's rules of procedure, *see* Chappell v. Rouch, 448 F.2d 446, 449-50 (10th Cir. 1971); whether the provision specifically referred to the statute of limitations, *see* 592 F.2d at 1122; 448 F.2d at 449-50; or whether the provision served other purposes in addition to regulating compliance with statutes of limitations, *see* 480 F.2d at 951-52; Chladek v. Sterns Transp. Co., 427 F. Supp. 270, 274 (E.D. Pa. 1977); Schinker v. Ruud Mfg. Co., 386 F. Supp. 626, 632 (N.D. Iowa 1974).

In *Walker* the Supreme Court looked to whether the applicable state provision (requiring service of process) promoted the purposes of the statute of limitations. *See Walker*, 446 U.S. at 751. "It is these policy aspects which make the service requirement an 'integral' part of the statute of limitations . . . ." *Id.* at 751-52. Therefore, the factors considered significant by the lower courts would be relevant primarily to the choice between state provisions such as when there is one general and one specific provision. When one state provision exists which is enforced by state courts for limitations purposes, the policies reflected by that provision must be considered regardless of whether it is described as integral, is a general civil rule, or has other purposes. *See* 2 J. MOORE, FEDERAL PRACTICE § 3.07 [4.-3-1], at 3-95 (1981).

121. *See generally Developments*, *supra* note 19, at 1185.

122. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974); Order of R. R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

setting a time limit the legislature may well have considered the likelihood that in adjudicating claims brought after that limit a court would have difficulty in accurately determining fact issues because of the unavailability of evidence.

B. *Actual Notice—The Underlying Purpose of the Service Requirement*

A commencement provision that requires service on the defendant within a specified period directly promotes these limitations policies.[123] Such a provision requires timely notice so as to alert the defendant to the need for preserving evidence and thereby promotes the purpose of protecting the judicial fact-finding process.[124] A requirement of service within a set or calculable period also provides the potential defendant a tool by which he can accurately calculate the deadline after which he may have peace of mind.[125] After that deadline he can assume his liability under that claim has evaporated and thus allocate his resouces to needs other than his legal defense in court. Professor Ely has identified this latter purpose of a service requirement as nonprocedural and therefore substantive in that it is not related to the conduct of litigation.[126] A requirement that the defendant be notified of suit within a calculable period also appears nonprocedural when characterized according to the expectations it engenders. Furthermore, consideration

123. *Cf. Tomanio*, 446 U.S. at 487.

124. In *Walker*, the United States Supreme Court, in applying the refined outcome-determinative test of Hanna v. Plumer, 380 U.S. at 466-68, held that a service requirement was substantive in the *Erie* sense. *Walker*, 446 U.S. at 752-53. Upon analysis the Court's reasoning proceeded as follows: (1) Rule 3 does not apply, therefore, *Erie* does; (2) State statutes of limitations are to be applied under *Erie-York*; (3) the Oklahoma Service requirement is an integral part of that state's statute of limitations and this suit would be barred in Oklahoma courts; therefore (4) to allow the cause to proceed in federal court would perhaps not promote forum shopping, but would constitute an inequitable administration of the law. One might wonder why a state-enforced requirement of filing plus issuance of the summons (but not service) would not be part and parcel of the state's statute of limitations even though it did not promote limitations policies. A response is that such a requirement would not be outcome-determinative under *Hanna* since failure to apply it would not promote forum shopping or constitute the inequitable administration of law—to the defendant's detriment. When the Court in *Walker* found the Oklahoma provision was an integral part of the statute of limitations by noting that it promoted limitations policies, it perhaps was accomplishing two purposes at once—showing that this provision was substantive not procedural to distinguish Rule 3 and demonstrating that the failure to apply it would be outcome-determinative. It should be noted that in the absence of an applicable Federal Rule of Civil Procedure even a clearly procedural state rule might be applicable under the *Hanna* outcome-determinative test. *See* Ely, *supra* note 42, at 721.

125. *See Walker*, 446 U.S. at 751 n.12.

126. *See* Ely, *supra* note 42, at 730-31. It might appear that such a requirement is substantive because it is part of the measurement of the life of a substantive claim. Any commencement provision, however, becomes a part of the measurement of a claim's life if it is applied. The question is whether it should be applied.

of the deadline leads a potential defendant to think in terms of freedom from suit rather than in terms of defense in court.

The Supreme Court in *Walker* concluded that, in contrast to Rule 3, the Oklahoma requirement of service applied in that case was a "statement of a substantive decision by that State."[127] The Court found Rule 3 inapplicable and proceeded to hold that the state rule must, under *Erie*, be applied because failure to do so would constitute the inequitable administration of law.[128] In reaching this conclusion, the Court noted that this service requirement furthers the policy decision that each defendant has a "legitimate right not to be surprised by notice of a law-suit" after the limitations period.[129] The Court also noted that this notice policy was further evidenced by Oklahoma's allowance of commencement as to defendants "united in interest" with other defendants who had received timely service.[130] Such a defendant would presumably have received actual notice of the lawsuit through a related co-defendant who had received timely service and would thereby have his peace of mind disturbed within the limitations period. Such a defendant would have knowledge, although received through informal means, within the period the state deems it feasible for him to gather and preserve his evidence.[131]

Without straining the Court's reasoning it can be said that actual notice is, in reality, the state's goal. The requirement of service to provide notice is merely a means of assuring that it is received. Actual notice of suit when received, through whatever means, within the period prescribed by state law effectively serves the purposes of a statute of limitations. Had the Court in *Walker* been presented with a conflict between the Oklahoma service requirement and a federal judge-made rule that filing plus actual notice, even though informally conveyed, satisfies a statute of limitations, it would not have been justified in concluding that the choice of that federal rule would have constituted the inequitable administration of law. The goal of both rules would be identical and only the means applied for achieving that goal would differ. When the goal of both federal and state rules was giving actual notice, differences in the manner or means of serving process was not deemed determinative by the Court in *Hanna*.[132] It is, of course, not the identification of a rule as a means to an end that is decisive; it is the

127. *Walker*, 446 U.S. at 751.

128. *Id.* at 753.

129. *Id.* at 751 n.12.

130. *Id.* at 752 n.12.

131. *See id.*

132. 380 U.S. 460 (1965). The court in *Hanna* noted the common goal of the conflicting rules, *see id.* at 462 n.1, and went on in its considered dictum to conclude that such a variance would not

recognition that this hypothetical federal rule would fully serve the same policies promoted by the state rule. The state rule does provide the additional "right" to transmission of notice by formal service of process. The only purpose for requiring service of process in addition to actual notice, however, is to remove questions about the receipt or sufficiency of that notice from state court consideration. If the rule was that the defendant need only be given, through any means, information sufficient to alert him within the limitations period of the filing of suit, the court would be required to determine that the information was received in time and was sufficient. To go further and require service of process removes the need for the court to determine these issues; it need only determine the timeliness of service. The state policy represented by the requirement of service rather than only actual notice is always, in a sense, served when those questions as to timeliness and sufficiency of notice are to be determined by a federal not a state court. This analysis is another way of showing that a service requirement of a state commencement provision is related only to the manner of giving notice and is, therefore, purely procedural in nature.[133]

Applying Professor Ely's test we can say that the only non-procedural right provided a defendant by a state service requirement is the right to actual notice within the period prescribed by state law.[134] Should the defendant receive sufficient notice, even though transmitted informally, he cannot legitimately enjoy peace of mind and would also be alerted to the need to gather and preserve his defensive evidence. All of the potentially substantive policies of a statute of limitations are served when the defendant is given sufficient information of the filing of the suit within the limitations period.[135]

On the other hand, a state provision that does not require some sort of notice within the limitations period or a set period thereafter fails to directly promote any of the policies of a statute of limitations. This type of provision instead represents a decision to protect plaintiffs from limitations problems arising in court by allowing commencement of a suit through steps that can be taken rapidly and over which plain-

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constitute the unfair discrimination against citizens of the forum state with which *Erie* was concerned. *See id.* at 468 n.9, 469.

133. The defendant, of course, will claim his right to service, but this is nothing more than a claim to have everything as it would be in state court. The question under *Erie* is not whether litigation in federal court varies from what it would have been in state court, but whether there is good reason in the *Erie* sense for not allowing certain variances. *See* 380 U.S. at 468.

134. *See* Ely, *supra* note 42, at 731. Professor Ely in discussing Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), made the point that the difference in that case, between Rule 3 and a state service requirement, was a difference between notice and no notice. *Id.* at 731 n.203. There would be no such difference in the hypothetical presented.

135. *See* 414 U.S. at 554-55.

tiff has greater control. Without a requirement of notice to the defendant he is not alerted within a prescribed period to the need for preserving evidence and this may work to impair the accuracy of the judicial fact-finding process. Moreover, without such a requirement a potential defendant has no deadline after which he can legitimately have peace of mind.[136] In short, any commencement provision not requiring notice within a set period must be seen as exclusively concerned with the maintenance and management of litigation and thereby as serving only procedural goals.[137]

The provision that informally-transmitted notice to the defendant will satisfy a statute of limitations is not without analogue in the Federal Rules of Civil Procedure. Rule 15(c) of the Federal Rules provides for the relation back of an amended complaint, when adding a defendant, to the date of the original so as to avoid the limitations defense of that defendant. Relation back is allowed when the claim stated in both the original and amended pleadings arose from the same transaction or occurrence and, within the limitations period, the added defendant received such notice of the institution of the action that he would not be prejudiced in defending on the merits and knew or should have known that but for a mistake he would have been named as a defendant.[138] Rule 15(c) has been applied in diversity actions and has not been seen to deprive defendants of state substantive rights or of any procedural due process right.[139]

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136. *See Walker*, 446 U.S. at 751:

> [A]ctual notice by the defendant is an integral part of the several policies served by the statute of limitations (citations omitted). The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim.

137. *See* Ely, *supra* note 42, at 726.

138. *See* FED. R. CIV. P. 15(c).

> *Relation Back of Amendments*. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

139. *See* Ingram v. Kumar, 585 F.2d 566, 568-69 (2d Cir. 1978); Skidmore v. Syntex Laboratories, Inc., 529 F.2d 1244, 1249 (5th Cir. 1976); Loudenslager v. Teeple, 466 F.2d 249, 250 (3d Cir. 1972); Crowder v. Gordons Transps., Inc., 387 F.2d 413, 415-18 (8th Cir. 1967). *See generally*

C. *Should Rule 3 Require Formal Service or Only Notice?*

A proposal that Rule 3 be amended to expressly impose either a service or a notice requirement for all limitations purposes would both alert plaintiffs to the need to take action beyond filing and preserve any state policy that could be legitimately identified as substantive. Such a Rule would, however, conflict with the commencement rule that has been applied for purposes of federal statutes of limitations in a majority of the federal circuits.[140] In *Moore v. Sid Richardson Carbon & Gas Co.*,[141] the court held that filing the complaint alone commenced an action for purposes of the four-year statute of limitations for federal anti-trust actions. In so doing the court found Rule 3 clearly stated that only filing was required.[142] Further justification for the court's holding was found in the legislative history of that federal statute of limitations and in the fact that Congress had enacted that statute subsequent to the adoption of the Rules.[143] This latter fact indicated to the court that Congress had known of the definition of commencement in Rule 3 when it provided for the barring of an anti-trust action unless "commenced" within four years.[144]

The assumption that Rule 3 applies as a commencement provision for federal limitations purposes is subject to serious doubt since the decision in *Walker*. In that case, the Court held that Rule 3 was not intended to toll a state statute of limitations but was meant to govern the date from which various time periods required by other Rules began.[145] As has been noted, the Court expressly reserved the question whether Rule 3 was a commencement provision for federal statutes of limitations,[146] but its holding raises doubts as to the Rule's controlling effect in that regard. Assuming Rule 3 as it presently exists is not a commencement provision for any statute of limitations does not, however, compel the conclusion that the decision in *Moore* was wrong. The alternative basis for the decision is that Congress, by using the

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Note, *Note: Federal Rule of Civil Procedure 15(c): Relation Back of Amendments*, 57 MINN. L. REV. 83, 99-100 (1972); 6 C. WRIGHT & A. MILLER, *supra* note 55, § 1498, 507.

140. *See* Appleton Elec. Co. v. Graves Truck Lines, Inc., 635 F.2d 603, 608 (7th Cir. 1980); Caldwell v. Martin Marietta Corp., 632 F.2d 1184, 1188 (5th Cir. 1980); United States v. Wahl, 583 F.2d 285, 288-89 (6th Cir. 1978); Metropolitan Paving Co. v. International Union of Operating Eng'rs., 439 F.2d 300, 306 (10th Cir. 1971); Moore Co. v. Sid Richardson Carbon & Gasoline Co., 347 F.2d 921, 922-23 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966); Hoffman v. Halden, 268 F.2d 280, 302 (9th Cir. 1959); Messenger v. United States, 231 F.2d 328, 329 (2d Cir. 1956).

141. 347 F.2d 921 (8th Cir. 1965).

142. *Id.* at 922.

143. *Id.* at 925.

144. *See* 15 U.S.C. § 15b (1976).

145. *Walker*, 446 U.S. at 750-51.

146. *Id.* at 751 n.11. *See* text accompanying notes 5-6, *supra*.

word "commencement" in a federal statute of limitations, intended to absorb the definition provided by Rule 3; therefore, even if Rule 3 does not itself operate as a commencement provision, a federal statute of limitations can still be interpreted to require only the filing of the complaint. Many federal statutes of limitations, in fact, do speak in terms of commencement[147] and, in addition, section 2415 of the Judicial Code provides that every action for money damages brought by the United States founded on any contract is barred "unless the complaint is filed within six years."[148]

A federal statute of limitations can, of course, create substantive rights under Professor Ely's test just as state statutes do.[149] The question is, however, whether a particular commencement provision promotes the substantive purposes of that statute.[150] As previously mentioned, a commencement provision that does not require notice to defendant within a prescribed period cannot be seen to further such purposes.[151] Therefore such a provision in a federal statute of limitations would not be substantive in this sense, and an amended Rule 3 which required service or notice for limitations purposes would perhaps supersede a federal statute of limitations in that respect.[152] The Enabling Act states in this regard that all laws in conflict with the Federal Rules shall be of no further force or effect.[153]

Even though the requirement of only filing does not implicate substantive rights, Congress, if it had any purpose in mind, might well have established that requirement as part of the overall purpose of the related substantive right. It should be noted here that federal statutes

147. *See, e.g.*, 46 U.S.C.A. § 763a (Supp. 1981) (death on high seas); 46 U.S.C. § 745 (1976) (admiralty suits against United States); 29 U.S.C. § 626(d) (1976) (age discrimination in employment actions); 15 U.S.C. § 15b (1976) (actions and prosecutions to enforce antitrust laws).

148. *See* 28 U.S.C. § 2415(a) (1976). It is difficult to conclude that this particularized requirement evidences a congressional understanding that commencement requires more than filing. The explicit requirement of filing might have been included without any intent to distinguish filing from commencement or, indeed, without awareness of any distinction.

149. *See* Engel v. Davenport, 271 U.S. 33, 38 (1926). A provision relating to commencement contained in such a federal statute can also be said to be interrelated with value judgments underlying that statute. *See Tomanio*, 446 U.S. at 487-88; Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975).

150. *See* 414 U.S. at 558 n.29.

151. *See* note 137 and accompanying text, *supra*.

152. In dissenting from the proposal of amendments to the Rules adopted in 1963, Justices Black and Douglas stated:

> We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President.

Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 865, 865-66 (1963).

153. *See* 28 U.S.C. § 2072 (1976).

of limitations are specially related to particular claims created by Acts of Congress. To establish a rigid requirement for commencement in the Rules would, therefore, restrict Congress's freedom in the structuring of the rights and remedies it creates. The Supreme Court has indicated that the overall policies of related federal rights should be carefully considered in the application of a federal statute of limitations. Thus, the decision to toll a federal statute of limitations is not to be determined by characterizing the matter as substantive or procedural but by asking whether the overall congressional purpose is effectuated by tolling the federal statute of limitations under the circumstances of a particular case.[154]

A proposal to amend Rule 3 to make it a commencement provision requiring actual notice or service in all instances would be within the constitutional and statutory rule-making power but would be unduly restrictive of Congress's freedom to structure the remedial nature of federal substantive rights. This conclusion assumes that the Rule would supersede prior congressional decisions, but this assumption is dubious. The effect on congressional decisions related to substantive federal rights appears sufficient alone to avoid a rigid requirement of service or notice.[155] Because of these consequences both the Supreme Court and Congress would have legitimate reason to believe such a proposal would be unwise.

V. Proposal for Amending Rule 3

A. *The Proposed Amended Rule—Text and Explanation*

Rule 3

Commencement of Action

A civil action is commenced by filing a complaint with the court. *A statute of limitations shall not be deemed a bar for failure to bring an action in a timely fashion if, within the period allowed by the applicable law for service of process, the defendant has instead received such notice of the filing of the complaint that he will not be prejudiced in maintaining his defense on the merits.*

1. The existing language of Rule 3 is retained so that the definition of commencement thereby provided will remain unchanged. "Commencement" is not used in the proposed amendment to Rule 3 so that the change would neither directly nor indirectly disturb existing interpretations of that word as used in federal statutes of limitations. More-

154. 414 U.S. at 557-58; Burnett v. New York Cent. R.R., 380 U.S. 424, 426-27, 427 n.2 (1965).

155. The purposes of the proposal are to give sufficient warning to plaintiffs and to protect them from loss of claims due to purely technical defects. Displacement of all other commencement rules is not necessary.

over, the time of commencement is significant in determining the existence of diversity of citizenship jurisdiction, in determining residence for venue purposes, in setting a beginning point for periods established in other of the Rules, and in determining priority between concurrent actions.[156]

2. *A statute of limitations shall not be deemed a bar for failure to bring an action in a timely fashion*

The proposed amendment states only an affirmative proposition—that if the following condition is satisfied, a statute of limitations will not bar an action. The amendment does not state the negative proposition that in order to satisfy *any* statute of limitations the following condition must be satisfied.[157] If the applicable law requires only filing, the plaintiff can simply satisfy that requirement.

3. . . . *if, within the period allowed by the applicable law for service of process*, . . .

The amendment is to provide a method by which plaintiff can satisfy any applicable statute of limitations. It would apply even when a state commencement provision required issuance of summons but not service within the limitations period. That state would necessarily "allow" service at a later time, and the failure of plaintiff to obtain issuance of summons would not be significant—only his failure to give notice within the period allowed for service. Nothing in the Rule would restrict a federal court from exercising its inherent power to clear the docket of cases for want of prosecution should inordinate delay be caused. The period is not described as the "limitations" period because that description could be interpreted to exclude those periods in addition to the limitations period in which service may be completed.[158]

4. . . . *the defendant has instead received such notice of the filing of the complaint that he will not be prejudiced in maintaining his defense on the merits.*

Informal notice received by the defendant would be allowed as an alternative method for complying with statutes of limitations. Notice need only be *received* by defendant, not necessarily transmitted by

156. *See* 4 C. WRIGHT & A. MILLER, *supra* note 55, § 1051, at 165-66.

157. This approach is taken from the analysis applied by Judge Keeton in Covel v. Safetech, Inc., 90 F.R.D. 427, 432-33 (D. Mass. 1981) to determine that Rule 15(c), providing for relation back of amendments, did not prohibit the allowance of relation back under a more liberal state rule in a diversity case.

158. *See* OKLA. STAT. ANN. tit. 12 § 97 (1971) (allowing completion of service within 60 days after filing if filing and an "attempt" to serve occur within the limitations period). *Compare* Ingram v. Kumar, 585 F.2d 566, 571-72 (2d Cir. 1978) (the "period provided by law for commencing the action" language of Federal Rule 15(c) includes the time after the limitations period in which service is allowed) *with* Simmons v. Fenton, 480 F.2d 133, 136-37 (7th Cir. 1973) (Rule 15(c) requires notice within the limitations period). *See also* Note, *supra* note 139, at 105-06.

plaintiff. The information received by defendant must, however, be in regard to the filing of the complaint; notice of the existence of a claim and the likelihood of a lawsuit is not sufficient. If this latter type of notice was allowed, the defendant's right to determine with certainty the end of his liability would be affected; and, thus, the substantive right to breathe easy, engendered by a service requirement, would be modified or abridged. A court might be prompted, by concentrating solely on "notice of filing," to require particularized information beyond what was necessary to inform defendant of the institution of the suit and the nature of the claim, but the subsequent language is included to control the court's consideration of the nature of the information received. By requiring notice that is sufficient to prevent prejudice to defendant's efforts to defend himself, one of the identified purposes of a statute of limitations is promoted. The requirement of notice also promotes the primary purpose of such a statute—fairness to defendant—in that he is assured of notice of suit, albeit informal, within the period allowed for service of process.

B. *Commentary on the Proposed Rule*

Rule 3, with the proposed amendment, would alert a plaintiff to the possibility that action beyond filing is required and would cause him to investigate further to discover the applicable law. The difficulty in determining whether the applicable state law required service would still exist, but through a quick reading of the Rule the plaintiff would know that complete safety could be achieved by filing the complaint and giving informal notice to the defendant within the limitations period. Misinterpretation of the "period allowed by law"language would most likely lead to the conclusion that it referred to the limitations period alone. Finding the applicable limitations provision would be less difficult than finding the applicable commencement provision and action on the basis of this misinterpretation would protect, not harm, the plaintiff.

The "notice" language of the proposal is taken largely from Rule 15(c)(1) of the Federal Rules. Rule 15(c) deals with the relation back of amendments that change the party against whom a claim is asserted and is carefully designed to bring about the fair adjudication of rights and obligations without disturbing the substantive rights of defendants.[159] It has been held valid and applicable in diversity cases even in

159. *See* text of Rule 15(c), FED. R. CIV. P., *supra* note 138. For example, if plaintiff incorrectly names a particular person as the defendant and then after the limitations period has expired seeks to correct his error by naming the real defendant in an amended complaint, the amendment-added defendant will not be able to successfully assert the limitations defense if the conditions of

the face of more restrictive state rules.[160]

As the law presently exists, a defendant added by an amendment after the limitations period could not successfully assert a limitations defense if he had received sufficient informal notice within that period.[161] This would be the result even if state law required service of process within the limitations period as to originally-named defendants.[162] The effect of Rule 15(c), therefore, is to deprive the amendment-added defendant of his state right to service of process within the limitations period while preserving his right to receive information within the period sufficient to alert him to the need for preserving his defensive evidence and, of course, sufficient to inform him that he had been sued. Had this defendant been named in the original complaint but not given service of process within the required period, he would be allowed to interpose his limitations defense even though, within that period, he had full knowledge of the filing of the complaint such that he would not be prejudiced in maintaining his defense.[163]

The Supreme Court did not consider the significance of informal notice in *Walker* but it did state that the case was indistinguishable

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Rule 15(c) are satisfied. Under these circumstances the amendment is said to relate back to the date of the original pleading in that the action stated in the amendment will be deemed to have been commenced when the action was initially instituted. Because the effect of Rule 15(c) is to deny a limitations defense to this added defendant, relation back is allowed only when the policies of a statute of limitations are served—when that defendant receives sufficient and timely notice of the original action knowing that but for a mistake he would have been named. To do otherwise, as the Advisory Committee's notes to the 1966 amendment to Rule 15(c) state, would be to "defeat unjustly the claimant's opportunity to prove his case." 39 F.R.D. 69, 83 (1966) (advisory committee notes); *see* Western & Lehman, *supra* note 113, at 363-64.

160. *See, e.g.*, Davis v. Piper Aircraft Corp., 615 F.2d 606, 612 (4th Cir. 1980), *cert. dismissed*, 448 U.S. 911 (1980); Britt v. Arvanitis, 590 F.2d 57, 60-61 (3d Cir. 1978); Ingram v. Kumar, 585 F.2d 566, 570 n.5 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); Simmons v. Fenton, 480 F.2d 133, 136 (7th Cir. 1973); Welch v. Louisiana Power & Light Co., 466 F.2d 1344, 1345 (5th Cir. 1972). *See generally* 380 U.S. at 473.

161. The notice received by the added defendant need not be formally transmitted. 39 F.R.D. 69, 82-3 (1966) (advisory committee notes); Haworth, *Changing Defendants in Private Civil Actions under Federal Rule 15(c)—An Ancient Problem Lingers On*, 1975 WIS. L. REV. 552, 572. Some commentators have discussed "informality" without clearly distinguishing between the means of giving or acquiring information and the nature of the information received, that is, whether defendant knew of a particular lawsuit or only of the likelihood of future filing. *See* 6 C. WRIGHT & A. MILLER, *supra* note 55, § 1498, at 507-11; Note, *supra* note 139, at 96-100.

If the notice required under Rule 15(c)(1) must be transmitted formally, that is, through service of process on the added defendant, the rule would have no remedial effect whatsoever. Rule 15(c) would, under these circumstances, have the effect of imposing the more onerous burden of service of process even when not required as to an original defendant. This was clearly not meant to be the purpose of this provision. *See* 39 F.R.D. 69, 82-83 (1966) (advisory committee notes).

162. *Cf.* Note, *supra* note 139, at 126-27.

163. In this case neither Rule 3 (because of *Walker*) nor Rule 15(c) (because by its terms it applies only to defendants added by amendment) would apply.

from *Ragan*.[164] In the court of appeals opinion in *Ragan*,[165] it is noted the plaintiff had not only filed his complaint within the two-year state limitations period but had also within that period secured service on one Clarence M. Trent in the offices of the defendant. This service was quashed, however, because the marshall in serving Trent, who was not an officer or registered agent of the corporation, had failed to exercise due diligence in ascertaining whether officers of the corporation could be found before he left the summons at the offices of the corporation. Since an alias summons was served after the period in which service was required, the court held the state statute of limitations barred plaintiff's action.[166] This decision was upheld by the Supreme Court.[167] As a consequence, a plaintiff who investigated his case to find out who the proper defendant was and where it was located suffered the loss of his claim because of the lack of diligence of the marshall, not because of his own lack of diligence in seeking service of process. It seems certain that Merchants Transfer & Warehouse company did receive actual notice within the limitations period but was allowed to escape liability by virtue of a pure technicality.[168]

The proposed amendment would prevent this unfair result and also make more consistent the treatment of original and amendment-added defendants.[169] A plaintiff would also be less vulnerable to mysterious state laws, elusive defendants, and less than adequate process-servers since he could take quick action on his own to preserve his claim by filing the complaint and then, perhaps, placing a telephone call to the defendant or his attorney. Assuming an attorney has been representing the defendant's interests in regard to that claim, he would be the person in the best position to take action to preserve defensive evidence and could be relied on to notify defendant of this development. Notice provided the attorney of a defendant added by an amendment has been imputed to that defendant to satisfy Rule 15(c)

164. *Walker*, 466 U.S. at 748.

165. Merchants Transfer & Warehouse Co. v. Ragan, 170 F.2d 987 (10th Cir. 1948).

166. *Id.* at 992-93.

167. 337 U.S. at 534.

168. The original summons was served on September 22, 1945, and the statute of limitations expired on October 1, 1945. The company filed its motion to quash this summons on October 12, 1945. *See* 170 F.2d at 989.

169. Inconsistency that would not be corrected arises in those jurisdictions in which filing is alone sufficient to commence an action for limitations purposes. Here, because Rule 15(c) requires notice be received within the period for "commencing the action," an amendment-added defendant has to receive notice within the limitations period while notice to an originally-named defendant can be received after that period. *See* 585 F.2d at 571. The suggestion of some commentators is to amend Rule 15(c) so that notice is sufficient if received within the period allowed for service of process. *See* Haworth, *supra* note 161, at 564; Note, *supra* note 139, at 133.

and therefore avoid a limitations bar.[170]

Service of process is, of course, the act by which a court asserts its jurisdiction to adjudicate the interests of the defendant. Aside from questions of amenability to service, the Due Process Clause requires, as a prerequisite to the exercise of jurisdiction, sufficient notice to defendant so that he will have a meaningful opportunity to appear and defend himself.[171] The notice required to satisfy due process is that which is reasonably certain to inform the defendant of the pendency of the action.[172] For purposes of assuring due process, some adequate form of service is, of course, ultimately required, but the purposes served thereby are different from the purposes served by a statute of limitations. Actual notice within the limitations period provides the defendant sufficient information to alert him to the fact of suit and the need to preserve evidence while formal service of process required at some later point but before adjudication of the defendant's interests assures him of a meaningful opportunity to appear and defend himself.[173]

VI. Conclusion

As I review this article I cannot put aside the concern that something more should be said to clarify, explain, or persuade. When, however, I look back to the twelve lonely words presently contained in the object of all this, it seems perhaps enough has been said. My peroration is therefore brief.

Nothing beyond inertia appears to justify continuing the trap inherent in the present existence of Rule 3. This Rule should be changed so that it, like the other Rules, may be construed to secure the just, speedy, and inexpensive determination of every action on the merits.

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170. *See* Kirk v. Cronvich, 629 F.2d 404, 407-08 (5th Cir. 1980); Montalvo v. Tower Life Bldg., 426 F.2d 1135, 1147 (5th Cir. 1970); Snodgrass v. Roberts Dairy Co., 82 F.R.D. 626, 631-32 (D. Neb. 1979); Washington v. T.G. & Y. Stores Co., 324 F. Supp. 849, 853 (W.D. La. 1971).

171. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

172. *Id.*

173. The issues also arise at different times and, when decided, have different consequences for the defendant. Due process notice questions are most often critical when a judgment has been entered against a defendant who has not appeared. Such rights can be asserted long after the judgment has been entered and often even in a different jurisdiction. Under these circumstances, proof of actual notice could be exceedingly difficult. Moreover, a decision on this issue may establish the ultimate liability of the defendant. Assertion of a limitations defense, on the other hand, must be part of the process of adjudicating the merits, more contemporaneous with the acts allegedly establishing notice, and the decision on that defense, though important, cannot establish the defendant's liability on the merits. There is, therefore, a distinct need for protecting the defendant's due process right to appear by requiring formal service of process since that procedure provides evidence of notice for the record.

APPENDIX

The following are reported decisions by federal courts in which one matter considered was the role of Rule 3 in regard to a statute of limitations. The decisions are broadly divided into cases based on diversity of citizenship jurisdiction and those brought on other bases of federal subject matter jurisdiction. Special attention was given diversity jurisdiction because considerations of federalism are to a greater degree implicated in such cases and because this division facilitated research.

SUMMARY

CASES

I. Decisions in cases based on diversity of citizenship jurisdiction.
   A. From the effective date of the Federal Rules of Civil Procedure to the date of the decision in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).
   [September 16, 1938 to June 20, 1949]

1. Courts of Appeals

Zuckerman v. McCulley, 170 F.2d 1015, 1018 (8th Cir. 1948).

Merchants Transfer & Warehouse Co. v. Ragan, 170 F.2d 987, 991-92 (10th Cir. 1948).

Isaacks v. Jeffers, 144 F.2d 26, 28 (10th Cir. 1944).

Hackner v. Guar. Trust Co., 117 F.2d 95, 98-99 (2d Cir. 1941).

2. District Courts

Stauffer v. McLain Trucking, Inc., 8 F.R.D. 478, 478-79 (N.D. Ohio 1948).

Blum v. Postal Tel., Inc., 60 F. Supp. 237, 238 (W.D. Pa. 1945).

Yudin v. Carroll, 57 F. Supp. 793, 798-99 (W.D. Ark. 1944).

International Pulp Equip. Co. v. St. Regis Kraft Co., 55 F. Supp. 860, 861 (D. Del. 1944).

Mealy v. Fidelity Nat'l Bank, 2 F.R.D. 339, 339 (E.D.N.Y. 1942).

Cannon v. Time, Inc., 39 F. Supp. 660, 661 (S.D.N.Y. 1939).

Gallagher v. Carroll, 27 F. Supp. 568, 570 (E.D.N.Y. 1939).

B. From the date of the *Ragan* decision to the date of the decision in *Hanna v. Plumer*, 380 U.S. 460 (1965).
[June 20, 1949 to April 26, 1965]

1. Courts of Appeals

Chicago, R.I. & P. R.R. v. Stude, 204 F.2d 954, 956 (8th Cir. 1953).

Foster-Milburn Co. v. Knight, 181 F.2d 949, 951-52 (2d Cir. 1950).

2. District Courts

Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913, 922 (S.D.N.Y. 1965).

Callan v. Lillybelle, Ltd., 234 F. Supp. 773, 776-77 (D.N.J. 1964), citing with approval *Ackerley v. Commercial Credit Co.*, 111 F. Supp. 92, 95-96 (D.N.J. 1953).

Harrison v. Kovats, 224 F. Supp. 581, 583 (W.D.S.C. 1963).

Wm. T. Burton, Inc. v. Reed Roller Bit Co., 214 F. Supp. 84, 86 (W.D. La. 1963).

Rios v. Drennan, 209 F. Supp. 927, 928 (E.D.N.C. 1962).

Mahan v. Ohio Auto Rentals Co., 207 F. Supp. 383, 384 (S.D. Ohio 1962).

Netermyer v. Henley, 205 F. Supp. 734, 735-36 (N.D. Ind. 1962).

Jozwiak v. Dayton Oil Co., 200 F. Supp. 300, 302 (S.D.N.Y. 1961).

Westerman v. Grow, 198 F. Supp. 309, 309 (S.D.N.Y. 1961).

Norwood v. Lineberger-Bergen, Inc., 195 F. Supp. 127, 129 (W.D.N.C. 1961).

Burkhardt v. Bates, 191 F. Supp. 149, 151 (N.D. Iowa 1961).

Skilling v. Funk Aircraft Co., 173 F. Supp. 939, 943 (W.D. Mo. 1959).

Johansson v. Towson, 177 F. Supp. 729, 732 (D. Ga. 1959).

L. G. Defelice & Son, Inc. v. Globe Indemnity Co., 23 F.R.D. 275, 278 (S.D.N.Y. 1959).

Kieffer v. Travelers Fire Ins. Co., 167 F. Supp. 398, 401 (D. Md. 1958).

Jack v. Travelers Ins. Co., 22 F.R.D. 318, 319 (E.D. Mich. 1958).

Lorraine Motors, Inc. v. Aetna Casualty & Sur. Co., 166 F. Supp. 319, 323 (E.D.N.Y. 1958).

Decker v. Boyle, 162 F. Supp. 164, 166 (W.D.N.Y. 1957).

Hagy v. Allen, 153 F. Supp. 302, 304-05 (E.D. Ky. 1957).

Hixon v. Highsmith, 147 F. Supp. 801, 802-03 (E.D. Tenn. 1957).

Cahill v. St. Mary's Hosp., 20 F.R.D. 103, 104 (E.D.N.Y. 1956).

Wagner v. New York, Ont. & W. Ry., 146 F. Supp. 926, 928-29 & n.2 (M.D. Pa. 1956).

General Elec. Co. v. Central Transit Warehouse Co., 127 F. Supp. 817, 824 (W.D. Mo. 1955).

Reisinger v. Cannon, 127 F. Supp. 50, 51 (D. Conn. 1954).

Lanigan v. Boston Terminal Corp., 112 F. Supp. 957, 957 (D. Mass. 1953).

Ackerley v. Commercial Credit Co., 111 F. Supp. 92, 95-96 (D.N.J. 1953).

Macri v. Flaherty, 115 F. Supp. 739, 743 (E.D.S.C. 1953).

West v. Cincinnati, N.O. & T.P. Ry., 108 F. Supp. 276, 278 (E.D. Tenn. 1952).

Myers v. Slotkin, 13 F.R.D. 191, 192 (E.D.N.Y. 1952).

Rogers v. Halford, 107 F. Supp. 295, 296 (E.D. Wis. 1952).
Glebus v. Filmore, 104 F. Supp. 902, 903 (D. Conn. 1952).
Burns v. Chubb, 99 F. Supp. 581, 582 (E.D. Pa. 1951).
Masterpiece Prod., Inc. v. United Artists Corp., 90 F. Supp. 750, 751 (E.D. Pa. 1950).
McCarley v. Foster-Milburn, 89 F. Supp. 643, 645 (W.D.N.Y. 1950).
Otto v. Hirl, 89 F. Supp. 72, 74 (S.D. Iowa 1950).
Nola Elec. Co. v. Reilly, 93 F. Supp. 164, 169 (S.D.N.Y. 1948).

C. From the date of the *Hanna* decision to the date of the decision in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). [April 26, 1965 to June 2, 1980]

1. Courts of Appeals
Rose v. K.K. Masutoku Toy Factory Co., 597 F.2d 215, 217-18 (10th Cir. 1979).
Walker v. Armco Steel Corp., 592 F.2d 1133, 1135 (10th Cir. 1979).
Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1122 (10th Cir. 1979).
Walko Corp. v. Burger Chef Sys., Inc., 554 F.2d 1165, 1167-68 (D.C. Cir. 1977).
Smith v. Peters, 482 F.2d 799, 800-01 (6th Cir. 1973).
Prashar v. Volkswagen of Am., Inc., 480 F.2d 947, 949-53 (8th Cir. 1973).
Chappell v. Rouch, 448 F.2d 446, 447-48 (10th Cir. 1971).
Anderson v. Papillion, 445 F.2d 841, 842 (5th Cir. 1971).
Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 604 (2d Cir. 1968).
Groninger v. Davison, 364 F.2d 638, 639-40 (8th Cir. 1966).

2. District Courts
Scharff v. Cameron Offshore Serv., Inc., 475 F. Supp. 48, 50-51 (W.D. La. 1979).
Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1093 (N.D.N.Y. 1977).
Cannon v. Metcalfe, 458 F. Supp. 843, 846-47 (E.D. Tenn. 1977).
Manatee Cablevision Corp. v. Pierson, 433 F. Supp. 571, 576 (D.D.C. 1977).
Chladek v. Sterns Transp. Co., 427 F. Supp. 270, 273 (E.D. Pa. 1977).

Sherwood v. Graco, Inc., 427 F. Supp. 155, 156-57 (D. Colo. 1977).

Bartholomeo v. Parent, 71 F.R.D. 86, 87 (E.D.N.Y. 1976).

Schinker v. Ruud Mfg. Co., 386 F. Supp. 626, 632-33 (N.D. Iowa 1974).

Leathers v. Serrell, 376 F. Supp. 983, 984 n.1 (W.D. Va. 1974).

Zarcone v. Condie, 62 F.R.D. 563, 570 (S.D.N.Y. 1974).

Benn v. Linden Crane Co., 370 F. Supp. 1269, 1279 (E.D. Pa. 1973).

Litts v. Refrigerated Transp. Co., 375 F. Supp. 675, 676 (M.D. Pa. 1973).

Bratel v. Kutsher's Country Club, 61 F.R.D. 501, 502 (S.D.N.Y. 1973).

Krout v. Bridges, 58 F.R.D. 560, 561 (N.D. Iowa 1973).

Janus v. J.M. Barbe Co., 57 F.R.D. 539, 541 (N.D. Ohio 1972).

Prashar v. Volkswagenwerk Aktiengesellschaft, 347 F. Supp. 129, 130 (D.S.D. 1972).

Meredith v. Glamorene Prod. Corp., 55 F.R.D. 397, 399 (E.D. Wis. 1972).

Tanner v. Presidents-First Lady Spa, Inc., 345 F. Supp. 950, 953, 958-61 (E.D. Mo. 1972).

McCrea v. General Motors Corp., 53 F.R.D. 384, 385 (D. Mont. 1971).

Alford v. Whitsel, 52 F.R.D. 327, 329 (N.D. Miss. 1971).

Smith v. Seaboard Coast Line R.R., 327 F. Supp. 536, 539 (D.S.C. 1971).

Anderson v. Phoenix Ins. Co., 320 F. Supp. 399, 401 (W.D. La. 1970).

Gatliff v. Little Audrey's Transp. Co., 317 F. Supp. 1117, 1119 (D. Neb. 1970).

Worldwide Carriers Ltd. v. Aris S.S. Co., 312 F. Supp. 172, 177 (S.D.N.Y. 1970).

Wheeler v. Standard Tool & Mfg. Co., 311 F. Supp. 1177, 1178-80 (S.D.N.Y. 1970).

Grabowski v. United States, 294 F. Supp. 421, 422-23 (D. Wyo. 1968).

Freeman v. Giacomo Costa Fu Andrea, 282 F. Supp. 525, 526 (E.D. Pa. 1968).

Hardy v. Green, 277 F. Supp. 958, 962 (D. Mass. 1967).

Hendriksen v. Roosevelt Hosp., 276 F. Supp. 731, 733 (S.D.N.Y. 1967).

Elizabethtown Trust Co. v. Konschak, 267 F. Supp. 46, 48 (E.D. Pa. 1967).

Greeson v. Sherman, 265 F. Supp. 340, 342 (W.D. Va. 1967).

Morman v. Standard Oil Co., 263 F. Supp. 911, 913-14 (D.S.D. 1967).

Kaiser v. Mayo Clinic, 260 F. Supp. 900, 908 (D. Minn. 1966).

Newman v. Freeman, 262 F. Supp. 106, 110 (E.D. Pa. 1966).

Phillips v. Murchison, 252 F. Supp. 513, 518 (S.D.N.Y. 1966).

Callan v. Lillybelle, Ltd., 39 F.R.D. 600, 601 (S.D.N.Y. 1966).

D. From the date of the *Walker* decision to the date of the last decision discovered.

[June 2, 1980 to June 5, 1981]

1. Courts of Appeals

Ellis v. Great S.W. Corp., 646 F.2d 1099, 1103 (5th Cir. 1981).

Calhoun v. Ford, 625 F.2d 576, 577 (5th Cir. 1980).

Kerney v. Fort Griffin Fandangle Ass'n, 624 F.2d 717, 722 (5th Cir. 1980).

2. District Courts

Rosa v. Cantrell, 508 F. Supp. 330, 333 (D. Wyo. 1981).

Roesberg v. Johns-Manville Corp., 89 F.R.D. 63, 67-68 (E.D. Pa. 1981).

Slaughter v. Haughton, 89 F.R.D. 163, 165 (N.D. Ill. 1981).

Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105, 1115 (E.D. Ky. 1980).

II. Decisions in cases brought on other bases of federal subject matter jurisdiction.

[1938 through 1980]

A. Courts of Appeals

Caldwell v. Martin-Marietta Corp., 632 F.2d 1184, 1188 (5th Cir. 1980).

Appleton Elec. Co. v. Graves Truck Line, Inc., 635 F.2d 603, 608 (7th Cir. 1980).

Ralston Purina Co. v. Barge Juneau & Gulf Caribbean Marine Lines, Inc., 619 F.2d 374, 376 (5th Cir. 1980).
United States v. Miller, 609 F.2d 336, 338 (8th Cir. 1979).
United States v. Wahl, 583 F.2d 285, 287-88 (7th Cir. 1978).
Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544, 546 (5th Cir. 1978).
Windbrooke Dev. Corp. v. Environmental Enter., Inc., 524 F.2d 461, 463 (5th Cir. 1975).
Utah v. American Pipe & Constr. Co., 473 F.2d 580, 583 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974).
Maryland Tuna Corp. v. MS Benares, 429 F.2d 307, 320 (2d Cir. 1970).
United States v. Gajewiski, 419 F.2d 1088, 1090-91 (8th Cir. 1969).
United States v. Woodbury, 359 F.2d 370, 375 (9th Cir. 1966).
Moore Co. v. Sid Richardson Carbon & Gasoline Co., 347 F.2d 921, 923 (8th Cir. 1965).
Fratt v. Robinson, 203 F.2d 627, 629 (9th Cir. 1953).
Pacific Employers Ins. Co. v. Parry Navigation Co., 195 F.2d 372, 373 (5th Cir. 1952).
Waterman v. Nelson, 177 F.2d 965, 965 (2d Cir. 1949).
Kessler v. Fleming, 163 F.2d 464, 468 (9th Cir. 1947).
Bomar v. Keyes, 162 F.2d 136, 140 (2d Cir. 1947).
Ore Steamship Corp. v. D/SA/S Hassel, 137 F.2d 326, 329 (2d Cir. 1943).
Reynolds v. Needle, 132 F.2d 161, 162 (D.C. Cir. 1942).
Maier v. Independent Taxi Owner's Ass'n, 96 F.2d 579, 581 (D.C. Cir. 1938).

B. District Courts

Gutierrez v. Vergari, 499 F. Supp. 1040, 1049 (S.D.N.Y. 1980).
New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 76 (S.D.N.Y. 1980).
Ratcliffe v. Ins. Co. of N. Am., 482 F. Supp. 759, 763 & n.6 (E.D. Pa. 1980).
Davis v. Krauss, 478 F. Supp. 823, 825 (E.D.N.Y. 1979).
Gardner v. King, 464 F. Supp. 666, 668-70 (W.D.N.C. 1979).
Preston v. Mendlinger, 83 F.R.D. 198, 201-02 (S.D.N.Y. 1979).
Tyrolf v. Veterans Admin., 82 F.R.D. 372, 374 (E.D. La. 1979).
United States v. Agnew, 80 F.R.D. 506, 507 (S.D. Fla. 1978).
Triplett v. Azordegan, 478 F. Supp. 872, 878-79 (N.D. Iowa 1977).

Dixon v. Universal Atlas Cement Div., 437 F. Supp. 1071, 1075 (W.D. Pa. 1977).

Shelley v. Bayou Metals, 422 F. Supp. 545, 546 (W.D. La. 1976).

Moffitt v. United States, 430 F. Supp. 34, 36 (E.D. Tenn. 1976).

United States v. Wahl, 406 F. Supp. 1396, 1398-99 (E.D. Mich. 1976).

Hester v. Hidden Valley Lakes, Inc., 404 F. Supp. 580, 581 (N.D. Miss. 1975).

Schofield v. Gilland, 78 F.R.D. 279, 280 (E.D. Tenn. 1975).

Holtzman v. Richardson, 361 F. Supp. 544, 548 (E.D.N.Y. 1973).

United States v. Black, 356 F. Supp. 366, 368 (W.D.N.Y. 1973).

Weaver v. United California Bank, 350 F. Supp. 1373, 1376 (N.D. Cal. 1972), citing with approval *Messenger v. United States*, 231 F.2d 328 (2d Cir. 1956).

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